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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

L.D. BUTLER, INC., a corporation,

Appellant,

vs.

PHILIP R. ASHLEY, individually and doing business as PHIL ASHLEY TRUCKING,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

JURISDICTIONAL STATEMENT.

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April 27, 1984

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Question Presented.

Whether the Minimum Rate Tariff established by the Public Utilities Commission of the State of California violated the Sherman Anti-Trust Act.

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Appellant,

vs.

PHILIP R. ASHLEY, individually and doing business as PHIL ASHLEY TRUCKING,

Appellee.

JURISDICTIONAL STATEMENT.

L. D. BUTLER, INC., a corporation, the appellant, appeals from the final judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven, dated December 8, 1983, affirming the summary judgment entered in favor of appellee, PHILIP R. ASHLEY, individually and doing business as PHIL ASHLEY TRUCKING, holding that the Minimum Rate Tariffs 8 and 8A prescribed by the Public Utilities Commission of the State of California were not violative of 15 USC §1, *et seq.*, commonly known as the Sherman Anti-Trust Act. A petition for a hearing by the California Supreme Court was denied on February 22, 1984.

OPINIONS BELOW.

The order of the California Supreme Court denying a hearing, which appears in the Appendix at page 12a is not reported. The opinion of the Court of Appeal of the State

of California, Second Appellate District, Division Seven, which appears in the Appendix hereto, page 1a, *infra*, is not reported.

The Summary Judgment in favor of appellee, PHILIP R. ASHLEY, and against appellant, L. D. BUTLER, INC., appears in the Appendix hereto, page 14a, *infra*. This trial court decision is not reported.

The Decision before the Public Utilities Commission of the State of California, Case 5438, OSH 116 (filed April 12, 1977) relating to the cancellation by the Public Utilities Commission of Minimum Rate Tariff 8-A is not reported. It is reprinted in the Appendix hereto, page 16a, *infra*.

JURISDICTION.

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven, affirming the Summary Judgment entered in favor of plaintiff, PHILIP R. ASHLEY, was entered on December 8, 1983. See page 11a, *infra*. A Petition for Hearing in the Supreme Court of the State of California was filed January 17, 1984. This Petition for Hearing was denied February 22, 1984. See page 12a, *infra*.

A supplementary Notice of Appeal to this Court was duly filed in the Court of Appeal of the State of California, Second Appellate District, Division Seven, on March 28, 1984. See page 13a, *infra*.

This Appeal is being docketed in this Court within ninety days from the denial of the hearing below. The jurisdiction of this Court is invoked under 28 USC §1257(a).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES.

A. Article VI, Clause 2 United States Constitution.

This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. 15 USC §1 — Sherman Anti-Trust Act.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

STATEMENT OF THE CASE.

Plaintiff below and appellee herein, PHILIP R. ASHLEY, individually and doing business as PHIL ASHLEY TRUCKING (hereinafter, ASHLEY) was engaged in the business of hauling agricultural products. Defendant below and appellant herein, L. D. BUTLER, INC.[1] (hereinafter, BUTLER), was a marketer of such products. From 1976 through 1978 BUTLER hired ASHLEY's hauling service and paid the amounts billed as presented. In July 1979 ASHLEY filed this action in State court, claiming that it had been paid less than the minimum rates established by the Public Utilities Commission of the State of California for its services and demanded the sum of $26,769.62 representing the claimed undercharge. ASHLEY filed a motion for summary judgment and BUTLER admitted that under the tariff regulations it had been undercharged and owed the money. However, BUTLER claimed that the tariff as applied was in restraint of trade and violated the Sherman Act, 15 USC §1, *et seq*.

The issue on this appeal is whether there was a violation of the Sherman Act.

In support of its position BUTLER, through its president, Martin Kemp, submitted a Declaration in Opposition to the Motion for Summary Judgment stating (1) that ASHLEY was claiming compensation for work that it did not do, (2)

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[1]L. D. BUTLER, INC. has no parent company, subsidiaries, or affiliates.

that ASHLEY's activity involved commerce throughout the United States, (3) that the federal anti-trust laws should apply, as there is no present substantial State interest in regulating the trucking industry, (4) that to pay for services not rendered is fundamentally unfair and discriminatory, and (5) that such payment is violative of the anti-trust laws of the United States. ASHLEY did not file any declaration in opposition to these statements, nor any objection thereto.

Between the date of the order granting summary judgment and the date of the oral argument before the California Court of Appeal, the California Public Utilities Commission on June 29, 1983, cancelled the tariff on the grounds, among others, that it was discriminatory. This opinion, although it has not yet been published by the P.U.C., was transmitted to the California Court of Appeal and was considered by that court in its opinion.

The California Court of Appeal held that the claims of BUTLER that the minimum rate structure was violative of the Sherman Act were irrelevant as a matter of law because the minimum rate structure was protected by the State Action Immunity Doctrine. Appellant believes that the uncontroverted evidence by BUTLER in the form of its president's declaration does not support this decision and that the decision is violative of the Sherman Anti-Trust Act. In affirming the judgment (as modified with respect to the interest on the judgment), the California Court of Appeal gave as grounds the erroneous view that the admitted activities of ASHLEY did not violate the anti-trust laws of the United States.

No motion for rehearing was made on the issue of the State Action Immunity Doctrine because that issue was fully discussed by the parties in their briefs on appeal and was referred to by the State Court of Appeal in its opinion. Under such circumstances a Petition for Rehearing would have

been redundant. BUTLER thereafter timely filed its Petition for Hearing in the Supreme Court of California. This petition was summarily denied. The decision of the Court of Appeal of the State of California, Second Appellate District, Division Seven, became the final judgment which BUTLER now seeks to have reviewed.

28 USC §2403(b) may be applicable in this case.

RAISING THE FEDERAL QUESTION.

Prior to any trial or any motion for summary judgment in the State court action below, the appellant raised the claim that the minimum rate tariffs promulgated by the California Public Utilities Commission were violative of the Sherman Anti-Trust Act (15 USC §1, *et seq.*) and were therefore unconstitutional due to the Supremacy Clause of the United States Constitution (Article VI, Clause 2). As the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Seven, indicated (p. 3, *infra*), the justices rejected any claim that the minimum rate tariff violated the Sherman Anti-Trust Act. "Defendant [appellant herein] contends that the minimum rates established by California's Public Utilities Commission violate the Sherman Act and should not be immune under the State Action Immunity Doctrine. That doctrine provides that the Sherman Act was not designed to prohibit the sovereign acts of a state. (*Parker v. Brown* (1943) 317 U.S. 341.) Defendant argues that the state had no interest in regulating the trucking industry and that the court below erred by failing to allow defendant to show that no interest in fact existed. We disagree."

Appellant's contention was reiterated in appellant's Petition for Hearing to the Supreme Court of California. Appellant asked that the Supreme Court of California reverse the summary judgment granted to PHILIP R. ASHLEY,

and asked the Court to remand the case to the Superior Court for trial on the issue of the alleged violation of the Sherman Act. The Supreme Court of California summarily denied appellant's Petition for Hearing before it. The denial of the Petition for Hearing made the California Court of Appeal decision the final decision, which final decision appellant now seeks to have reviewed before the Supreme Court of the United States.

THE QUESTION IS SUBSTANTIAL.

In *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), this Court held that the party claiming immunity from a Sherman Anti-Trust Act violation under the State Action Immunity Doctrine must prove (1) that the State restraint was clearly articulated and affirmatively expressed as State policy, and (2) that the policy was actively supervised by the State itself. The California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431 (1978) at page 446, recognized "(The) heavy 'presumption against implicit exemptions' to the Sherman Act." Applying this "heavy presumption" to the instant factual situation in which ASHLEY admitted (by failure to deny) that ASHLEY was claiming compensation for work that it did not do, that there is no present substantial state interest in regulating the trucking industry and the federal anti-trust laws should apply, that payment for services not rendered is unfair and discriminatory, and that such payment is violative of the anti-trust laws of the United States, it is clear that BUTLER is entitled to a judgment finding an anti-trust violation unless respondent has in some fashion proved (1) an explicit State policy, and (2) a policy that is actively supervised by the State of California. No evidence was presented by ASHLEY with reference to those issues.

The opinion of the California Court of Appeal found that Section 3661[2] and 3662[3] of the California Public Utilities Code set forth a clear and affirmatively expressed policy. However, BUTLER contends that the use of the words "lowest lawful rates" in Section 3661 requires the establishment of a rate in accordance with the Sherman Anti-Trust Act. The Sherman Anti-Trust Act requires that "lawful" be that price which the policy of competition will establish. *Norton P.R. Company v. United States*, 356 U.S. 1 (1958). It is equally clear that the policy statement contained in Section 3661 does not affirmatively express a minimum rate policy such as that imposed by the Public Utilities Commission in this case. Nor is this restraint (the minimum rate as imposed by the Commission) clearly articulated or even addressed in the policy statement.

The California Constitution is equally silent, merely stating that the Commission may fix an established rate for the transportation of passengers and property by transportation

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[2]Public Utilities Code Section 3661 provides:

"It is the policy of the State to be pursued by the commission to establish such rates as will promote the freedom of movement by carriers of the products of agriculture, including livestock, at the lowest lawful rates compatible with the maintenance of adequate transportation service."

[3]Public Utilities Code Section 3662 provides:

"The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by any highway permit carrier for the transportation of property and for accessorial service performed by it.

"In establishing or approving such rates the commission shall give due consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or of any accessorial service, value of the commodity transported, and the value of the facility reasonably necessary to perform the transportation service."

companies. *The Constitution of the State of California*, Article 12, Section 4.[4]

With respect to a policy which is actively supervised by the State of California, ASHLEY presented no evidence to show any supervision whatsoever in the Courts below (in which case the heavy presumption against immunity should apply), but ASHLEY in the courts below relied on Sections 3662 and 3664[5] of the Public Utilities Code which fail to describe any actual active supervision of the "state policy". The California Court of Appeal in responding to this issue concluded without any evidence whatsoever that "the commission plays an active role in setting the prices". In fact, it is BUTLER's position that the commission has not for years played an active role in supervising the tariff. The only evidence before the court on this point was the admission (by failure to deny) that there was no substantial state interest in regulating the trucking industry and that payments under the tariff were violative of the anti-trust laws. The California Court of Appeal decision below negates both the heavy presumption against immunity and the requirement that there must be a showing of active supervision of the restraint on competition in order for the restraint

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[4]Article 12, Section 4 provides:

"The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result."

[5]Public Utilities Code Section 3664 provides:

"It is unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this article."

to be immune from the Sherman Anti-Trust Act.

On June 29, 1983, the Public Utilities Commission of the State of California entered Decision No. 83-06-083 in Case 5438, OSH 116, *et al.*, at San Francisco, California. This Decision cancelled the Minimum Rate Tariff 8-A which is the minimum rate tariff involved in this proceeding. In the course of this P.U.C. decision, the Commission (in its findings of fact) concludes in Finding of Fact No. 9 that this minimum rate tariff produces "charges which are unduly discriminatory against California intrastate shippers as opposed to the lower level of the going interstate rates from nearby states into California. . . ." and in Finding of Fact No. 11 "adherence to MRT 8-A rates does not allow carriers the flexibility of moving produce in shed-to-market movements at the lowest rates compatible with maintenance of adequate transportation service . . ." and in Finding of Fact No. 14 that "(i)t is inconsistent to regulate the rates for the shed-to-market movement of fresh fruits and vegetables when the field-to-field movement of those commodities is not regulated." In the Conclusions of Law, the Commission's decision determined in Conclusion of Law No. 2 that the "(c)ontinuation of MRT 8-A will not further the State policy enunciated in PU Code §§726 and 3661 respecting the movement of agricultural commodities . . ." and in Conclusion of Law No. 4 that the "(c)ancellation of MRT 8-A will further the State policy enunciated in PU Code §§726 and 3661 respecting the movement of agricultural commodities." Conclusion of Law No. 5 required that "MRT 8-A should be cancelled July 29, 1983."

The decision is labeled an interim order and the Commission's Transportation Division staff was ordered to set up a program to monitor rate levels and industry performance after the cancellation of MRT 8-A with a view of remaining knowledgeable about conditions in the produce-

hauling industry and being able to identify any problems and recommend modifications to this deregulation program should the need arise.

The Commission's decisions are not binding, but the Commission is a constitutional court and its decisions have been persuasive as reflecting the views of the body charged with the regulation of intrastate carriers. See *Demeter v. Anneson*, 80 Cal. App. 2d 48 (1947).

It is obvious that the Public Utilities Commission no longer believes that a minimum tariff serves any public policy in the agricultural products area and, in fact, discriminates against intrastate carriers. The California Court of Appeal rejected BUTLER's argument that this cancellation and the findings contained therein prevented ASHLEY from overcoming the presumption in favor of the Sherman Anti-Trust Act. BUTLER believes that this decision articulates a policy against the use of minimum rate tariffs. Under these circumstances the State Action Immunity Doctrine should not apply.

The gravamen of BUTLER's complaint is the lost opportunity for BUTLER to present evidence at the trial level as to what the State of California and the Public Utilities Commission really did or did not do in setting the minimum rate in this particular case. BUTLER believes that if it had had this opportunity, the trial court would have found the same discrimination that compelled the Public Utilities Commission to cancel the program. BUTLER submits that the evidence before the trial judge did not show that the procedures for setting the minimum rates are actively supervised by the State of California. It must be emphasized that ASHLEY had this burden of proof and failed to present any evidence, brief or argument to the trial judge on this point.

ASHLEY failed to present any evidence on this point and failed to controvert the statements of BUTLER's president because to do either would have pointed out to the trial judge that there did exist a triable issue of fact, and summary judgment would have been denied. In effect, by admitting the anti-trust violation but claiming that the State Action Immunity Doctrine is applicable, ASHLEY has so far successfully avoided having to prove any supervision of this state policy, supervision that BUTLER claims has not existed for many years.

By failing to deny the declaration made by Martin Kemp, ASHLEY has admitted that it was claiming compensation for work that it did not do, that ASHLEY's activity involved commerce throughout the United States, that the federal anti-trust laws should apply as there is no present substantial State interest in regulating the trucking industry, that to pay for services not rendered is fundamentally unfair and discriminatory and thus such payment is violative of the Sherman Anti-Trust Act. Yet with all of these admissions, the courts below have determined that ASHLEY in fact did not violate the Sherman Anti-Trust Act. BUTLER submits that ASHLEY has failed to establish immunity from the Sherman Anti-Trust Act because it did not at the hearing on the motion for summary judgment overcome the heavy presumption against immunity; because it failed to show clearly articulated and affirmatively expressed State policies with reference to this restraint; and because it failed to show that the policy was actively supervised. Finally, the cancellation by the Public Utilities Commission of the Minimum Rate Tariff eliminated the state action and buttressed the "heavy presumption against immunity" enjoyed by the Sherman Act.

CONCLUSION.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SWARNER & FITZGERALD,
EDWARD L. MACKEY,
Attorneys for Appellant,
L.D. Butler, Inc.

APPENDIX.

Decision of the Court of Appeal of the State of California, Second Appellate District, Division Seven.

In the Court of Appeal of the State of California, Second Appellate District, Division Seven.

Philip R. Ashley, Individually, and doing business as Phil Ashley Trucking, Plaintiff, Cross-Defendant and Respondent, v. L. D. Butler, Inc., a corporation, Defendant, Cross-Complainant and Appellant. 2D CIV. No. 68272 (Super.Ct. No. C 291871).

Filed: December 8, 1983.

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Baldonado, Judge. Modified and, as modified, affirmed.

Swarner & Fitzgerald, and Edward L. Mackey, for Defendant, Cross-Complainant and Appellant.

Knapp, Grossman & Marsh, and Wesley G. Beverlin, for Plaintiff, Cross-Defendant and Respondent.

This is an appeal from a summary judgment in favor of plaintiff and respondent Ashley. The question on appeal is whether there was a triable issue of fact on a claimed Sherman Act violation. Plaintiff Philip Ashley was engaged in the business of hauling agricultural products. He was a California intrastate highway carrier as defined in section 3511 of the California Public Utilities Code and conducted his transportation operations under highway carrier permits issued by the California Public Utilities Commission (PUC). Defendant and appellant, L. D. Butler, Inc., is a marketer of agricultural products.

From 1976 through 1978, defendant hired plaintiff's hauling services and paid the amounts billed as presented.

In 1978, the PUC conducted a spot audit of Ashley's transportation records and discovered approximately 11 in-

stances wherein he had rendered intrastate transportation services for Butler at rates less than those prescribed by PUC Minimum Rate Tariffs 8 and 8A.

The PUC ordered plaintiff to rebill Butler for $597.05 in undercharges. Plaintiff rebilled defendant and was paid the $597.05. The PUC also required plaintiff to audit his past Butler freight bills and determine whether other undercharges were also due. Plaintiff accomplished this and sent defendant a bill for the resulting undercharges in the amount of $26,738.80. Plaintiff alleges that defendant never responded to this billing.

On August 10, 1979, plaintiff commenced this action to collect the alleged undercharges. On September 19, 1979, Butler filed a special demurrer for uncertainty which was overruled. On October 29, 1979, defendant filed its initial answer along with a cross-complaint alleging breach of contract and overpayment of freight charge. Defendant denied the applicability of the PUC tariff charges and also any liability for undercharges.

On December 19, 1980, defendant filed a motion to amend its answer, asserting a new affirmative defense that the minimum tariff rate was a violative of the Sherman Act. On January 12, 1981, the court granted the motion.

During this time plaintiff served Butler with two sets of requests for admissions and interrogatories. Defendant responded to these discovery requests and admitted that defendant had hired plaintiff's transportation service, that the calculation of the undercharges was correct, and that defendant had paid a rate less than that prescribed *by the tariff*.

On March 4, 1982, plaintiff filed a motion for summary judgment. On April 15, 1982, Martin Kemp, defendant's president, submitted a declaration in opposition to the motion for summary judgment, stating (1) the plaintiff in charg-

ing for unloading was claiming compensation for work that he did not do, (2) that plaintiff's activity involved commerce throughout the United States, (3) that the federal antitrust laws should apply as there is no present substantial interest in regulating the trucking industry, (4) that to pay for services not rendered is fundamentally unfair and discriminatory, and (5) that such payment is violative of the antitrust laws of the United States. Kemp claimed that these statements were based on 20 years of experience in the trucking industry.

On April 19, 1982, plaintiff filed a reply to defendant's declaration in opposition to the motion for summary judgment. In that reply plaintiff objected to Kemp's qualifications to testify as to whether or not defendant had been overcharged for the loading.

On April 22, 1982, the court granted plaintiff's motion and entered its judgment in favor of plaintiff's complaint and against defendant's cross-complaint. Defendant appeals from that judgment.

Defendant contends that the minimum rates established by California's Public Utilities Commission violate the Sherman Act and should not be immune under the State Action Immunity Doctrine. That doctrine provides that the Sherman Act was not designed to prohibit the sovereign acts of a state. (*Parker v. Brown* (1943) 317 U.S. 341.) Defendant argues that the state has no interest in regulating the trucking industry and that the court below erred by failing to allow defendant to show that no interest in fact existed. We disagree.

1. *Summary Judgment*

Defendant's president, Martin Kemp, made certain statements that it now argues presented triable issues of fact as to the existence of a violation of the Sherman Anti-Trust

Law. It also argues that the court was required to consider Kemp's statements pursuant to Code of Civil Procedure[1] Section 437c, which requires the court in ruling on a motion for summary judgment to "consider all the evidence set forth in the papers . . . and all inferences reasonably deductible from such evidence. . . ."

Kemp's statements again were that: (1) plaintiff was claiming compensation for work that he did not do; (2) plaintiff's activity involved commerce throughout the United States; (3) the federal antitrust laws shall apply as there is no present substantial state interest in regulating the trucking industry; (4) paying for services not rendered is fundamentally unfair and discriminatory; (5) such payment is violative of the antitrust laws of the United States.

"Summary judgment is proper only if [the party opposing the motion] does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 851.)

In order to prevail in this appeal, Kemp's declaration in opposition to the motion for summary judgment must be shown to have presented facts which gave rise to a triable issue. Plaintiff contends that because the declarations begin with Kemp stating that they are based on his opinion and belief and contain factual and legal conclusions they should not be considered. (*Bowden v. Robison* (1977) 67 Cal.App.3d 705, 719-720.) However, in plaintiff's reply to the declaration in opposition to the motion, plaintiff raised only one objection. That objection was to Kemp's qualification to testify as to whether there had been a labor charge for work not done. Plaintiff cannot now on appeal raise evidentiary

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[1]Unless otherwise indicated, all references are to the California Code of Civil Procedure.

objections to the other statements. Section 437c, subparagraph (b), provides that "[e]videntiary objectives [*sic*], not raised in writing or orally at the hearing, shall be deemed waived."

The question then is did any of Kemp's statements raise triable issues of fact?

2. *The State Action Immunity Doctrine*

Defendant's primary argument is that the cumulative effect of Kemp's statements provided a basis for a triable issue as to a Sherman Act violation. Defendant focuses on Kemp's statement that the state had no interest in regulating the trucking industry. Its analysis begins with the proposition that there is a heavy presumption against immunity to the antitrust laws and that once a state law is challenged, the state must show that its articulated policies in fact exist.

The United States Supreme Court has consistently held that anticompetitive acts by the state acting as sovereign are immune from the antitrust laws despite the heavy presumption against immunity. (*Bates v. State Bar of Arizona* (1977) 433 U.S. 350; *Parker v. Brown, supra*, 317 U.S. 341.) Furthermore, *Rice v. Alcoholic Bev. Etc. Appeals Board* (1978) 21 Cal.3d 431, on which defendant places much emphasis, also held that there was a heavy presumption against immunity. However, that court also held that the sovereign acts of a state would immunize a law from the Sherman Act. The *Rice* court then proceeded to isolate the characteristics of a rule or program that would qualify it as a "sovereign act."

Rice reviewed the United States Supreme Court cases between *Parker* and *Bates* which have dealt with the State Action Immunity Doctrine. *Rice* isolated two predominant characteristics which would qualify a rule as a sovereign act: (1) an active role by the state in initiating the anti-

competitive behavior, and (2) clearly articulated policies as to the anticompetitiveness of the law to effectuate some state interest. (21 Cal.3d at pp. 444-445.) The United States Supreme Court, in fact, since *Rice* has identified the same criteria for qualification as a sovereign act as the California Supreme Court in *Rice*, the clearly articulated policy and an active role by the state. (*Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.* (1980) 445 U.S. 97, 105.)

Both the United States and California Supreme Courts have held that the state was not acting as sovereign when the above criteria were not met. In a line of cases the United States Supreme Court has focused on the role the state played in the anticompetitive conduct. *Goldfarb v. Virginia State Bar* (1974) 421 U.S. 773, held that minimum prices *set* by a *county bar association* were not immune from antitrust prohibitions. Also *Cantor v. Detroit Edison Co.* (1976) 428 U.S. 579, held that a charge for light bulbs by Edison included as a cost of electricity in Southern Michigan was not immune. Significantly, *Cantor* noted that it was the utility company which had decided to institute the program and not the state.

Similarly, the California Supreme Court in *Rice, supra*, held that a challenged statute was not immune where the state had played no active role in setting the minimum prices. This price setting was in fact done by producers without regard to any actual or potential anti-competitive effects.

The second focus is on the policies articulated by the state. *Cantor v. Detroit Edison Co., supra*, 428 U.S. 579, held that where the statute was silent on policy, no immunity could be made out. However, in *Bates v. State Bar of Arizona, supra*, 433 U.S. 350, the court held that because Arizona clearly articulated its policies and subjected them to pointed re-examination by the policy maker, the prohibition against attorney advertising was exempt from the Sherman Act.

The facts in this case are quite similar to those in *Bates v. State Bar of Arizona, supra*, and *Parker v. Brown, supra*, 317 U.S. 341, in which the State Action Immunity Doctrine was first enunciated. In *Parker*, as here, the challenged program is mandated by legislative command of the state. The state has "created the machinery for establishing the program and . . . adopted and enforced it" (*Rice, supra*, 21 Cal.3d at p. 442), acting through a commission authorized to set minimum rates (See *California Trucking Ass'n v. Public Utilities Commission* (1977) 19 Cal.3d 240, discussing the commission's authorization to set minimum rates.)

The state has also clearly articulated and expressed its policies in sections 3661[2] and 3662[3] of the Public Utilities Code. This clear articulation was considered to be very important in *Bates v. State Bar of Arizona, supra*, 433 U.S. 350. Contrary to defendant's contention that there was a

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[2]Public Utilities Code section 3661 provides:

"It is the policy of the State to be pursued by the commission to establish such rates as will promote the freedom of movement by carriers of the products of agriculture, including livestock, at the lowest lawful rates compatible with the maintenance of adaequate [*sic*] transportation service."

[3]Public Utilities Code section 3662 provides:

"The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by any highway permit carrier for the transportation of property and for accessorial service performed by it.

"In establishing or approving such rates the commission shall give due consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or of any accessorial service, the value of the commodity transported, and the value of the facility reasonably necessary to perform the transportation service."

triable issue of fact as to whether or not plaintiff loaded the goods, it is immaterial whether the labor was done.

The labor charges are included as a factor in the commission's cost studies in deciding the reasonableness of the rates (PUC Decision No. 87255, Case No. 5438) and the PUC-established minimum tariff rates cannot be changed by any agreement or conduct of the parties (*Gardener v. Basich Bros. Construction Co.* (1955) 44 Cal.2d 191, 193-194).

Defendant has submitted PUC Decision No. 83-06-083 in Case No. 5438, OSH, *et al.*, entered on June 29, 1983, to support his argument. That decision cancels the minimum tariff rate 8-A. The commission decided that the minimum rate no longer serves the policies enunciated in Public Utilities Code sections 726 and 3661. Defendant argues that this cancellation prevents plaintiff from overcoming the presumption in favor of the Sherman Act.

However, as defendant itself points out, the commission's decisions are not binding. (*Demeter v. Anneson* (1947) 80 Cal.App.2d 48, 55.) And this decision does not override the articulated policies in Public Utilities Code section 3661 and 3662 where the Legislature has determined that minimum rates may be necessary to further state interests.

Because sections 3661 and 3662 of the Public Utilities Code clearly articulate the policies and the commission plays an active role in setting the prices, the statute was a sovereign act of the state and therefore immune from the Sherman Act.

3. *Balancing of Interests*

Defendant's second proposition is that because there is a heavy presumption against immunity, the court is (1) compelled to answer the threshold question of whether or not the state is acting or compelling an act, and (2) required to

balance it articulated interests against those of the Sherman Act.

The United States Supreme Court has indeed held compulsion by the state is only the "threshold inquiry." (*Cantor v. Detroit Edison Co., supra*, 428 U.S. at p. 600, citing *Goldfarb v. Virginia State Bar, supra*, 421 U.S. 773, 790.) That inquiry focuses on whether the state action was the type that the Sherman Act was not meant to proscribe because the state is requiring the act. In those cases, the state was found not be be acting independently. Here, plaintiff is compelled to charge the minimum rate and has taken no part in establishing them. The state is the real party in interest engaging in the anticompetitive behavior. This factor was considered to be quite important in *Bates v. State Bar of Arizona, supra*, 433 U.S. 350.

Defendant's reliance on *Rice v. Alcoholic Bev. Etc. Appeals Bd., supra*, 21 Cal.3d 431, to support the proposition that despite a finding of a sovereign act by the state the court must engage in a balancing exercise, is misplaced. That case only held that when a statute enacted pursuant to the Twenty-First Amendment conflicts with an enactment based on the Commerce Clause, the policies of each must be balanced in order to determine which should prevail. The court did not enunciate a general rule that after finding that the state was acting as sovereign, the court is required to balance the respective interests. Therefore, when a state has clearly articulated its policies as to anticompetitive behavior and has played an active role in implementing the behavior, no further inquiry by the court is mandated and the state immunity doctrine applies.

Since defendant responded to the discovery requests by admitting that defendant had hired plaintiff's services, that the collection of the undercharges was correct, and that defendant had paid a rate less than that prescribed by the

tariff, there were no material issues of fact. Therefore, plaintiff was entitled to summary judgment as a matter of law. (*Angelus Chevrolet* v. *State of California* (1981) 115 Cal.App.3d 995, 1004.)

4. *Sanctions for Frivolous Appeal*

Plaintiff asks that the court schedule a hearing wherein the issue of whether this appeal was frivolous or not can be determined. Plaintiff maintains that the facts of this case fall into the category of an appeal taken solely for delay and therefore the court should impose penalties and damages pursuant to section 907 and the California Rules of Court, rule 26(a). We disagree.

A very recent California Supreme Court case has held that ". . . an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.] [¶] However, any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

Plaintiff has failed to show that these criteria exist. The request for sanctions is therefore denied.

5. *Interest on Judgment*

Plaintiff also contends that he is entitled to interest on the judgment at the new legal rate of 10 percent pursuant to section 685.010. The trial court granted judgment "for

the sum of $26,738.80 plus legal interest thereon at the rate of $5.20 per day from July 17, 1979, in the sum of $5,496.40 until paid." Plaintiff argues that this amount was calculated at a rate of 7 percent and the amount is incorrect. This statute was added in April 1982 and raised the legal rate of interest to 10 percent on all judgments entered on or after January 1, 1982. (Stats. 1982, ch. 150, § 6.) Plaintiff's judgment was entered on June 9, 1982. Therefore, the new legal rate of 10 percent should apply on the $26,738.80 at $7.32 per day, from July 17, 1979, until it is paid.

Disposition

The judgment is modified to provide judgment for plaintiff for the sum of $26,738.80, plus legal interest thereon at the rate of $7.32 per day from July 17, 1979, and thereafter. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED

THOMPSON, J.

We concur:

SCHAUER, P.J.

JOHNSON, J.

Order, Hearing Denied.

FEB 27, 1984

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102.

FEB 22, 1984

I have this day filed Order
HEARING DENIED *In re:* 2 Civ. *No.* 68272 PHILIP R. ASHLEY *vs.* L.D. BUTLER, INC.

Respectfully,
Clerk

Notice of Appeal to the Supreme Court of the United States.

In the Court of Appeal of the State of California, Second Appellate District Division Seven.

Philip R. Ashley, individually and doing business as Phil Ashley Trucking, Plaintiff, Cross-Defendant and Respondent, vs. L. D. Butler, Inc., a corporation, Defendant, Cross-Complainant and Appellant. CIVIL NO. 68272.

Filed: March 28, 1984.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that L. D. BUTLER, INC., the Appellant above-named, hereby appeals to Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, Second Appellate District, affirming the entry of a summary judgment in favor of PHILIP R. ASHLEY, individually and doing business as PHIL ASHLEY TRUCKING, the Respondent above-named, entered in this action on December 8, 1983, a hearing on which was denied by the California Supreme Court on February 22, 1984.

This appeal is taken pursuant to 28 USC §1257(a). 28 USC §2403(b) may be applicable.

DATED: March 26, 1984.

SWARNER & FITZGERALD

By /s/ Edward L. Mackey
Edward L. Mackey
Attorneys for Defendant/Cross-Complainant and Appellant

Summary Judgment in Favor of Plaintiff and Cross-Defendant, Philip R. Ashley, and Against Defendant and Cross-Complainant, L.D. Butler, Inc.

Supervisor Court of the State of California for the County of Los Angeles.

Philip R. Ashley, individually and doing business as Phil Ashley Trucking, Plaintiff, vs. L.D. Butler, Inc., a corporation and Doe I through Doe X, inclusive, Defendants.

L.D. Butler, Inc., a corporation, Cross-complainant, vs. Philip R. Ashley, Individually and dba Phil Ashley Trucking and Roes I through X, inclusive, Cross-defendants.

CASE NO. C 291871

Filed: June 9, 1982.

The Motion of Plaintiff and Cross-Defendant, PHILIP R. ASHLEY, for Summary Judgment was regularly heard on April 22, 1982. Appearing as Attorneys for plaintiff was WESLEY G. BEVERLIN, of KNAPP, GROSSMAN & MARSH. Apearing as Attorney for Defendant was EDWARD L. MACKEY, of SWARNER & FITZGERALD. After full consideration of moving and responding papers, all supporting papers and oral arguments of Counsel, it appears and the Court finds that Plaintiff has shown by admissible evidence and reasonable inference from that evidence that there is no defense to Plaintiff's undercharge action, and that Defendant BUTLER has presented no triable issue of fact.

Similarly, it appears and the Court finds that Cross-Defendant has shown by admissible evidence and reasonable inferences from the evidence that BUTLER'S Cross-Complaint has no merit, and that Cross-Complainant BUTLER has presented no triable issue of fact.

IT IS HEREBY ORDERED that judgment be entered in accordance with this Order in favor of Cross-Defendant

PHILIP R. ASHLEY, and against Cross-Complainant, L.D. BUTLER, INC., as prayed for in the Answer to the Cross-Complaint.

IT IS FURTHER HEREBY ORDERED that judgment be entered in accordance with this Order in favor of Plaintiff PHILIP R. ASHLEY and against Defendant L.D. BUTLER, INC., as follows:

1. For the sum of $26,738.80 plus legal interest thereon at the rate of $5.20 per day from July 17, 1979, in the sum of $5,496.40 until paid.

2. For costs of suit in the sum of $_____.

DATED: June 9, 1982.

/s/ Arthur Baldonado
JUDGE OF THE SUPERIOR COURT.

Decision 83-06-083 Case No. 5438, OSH 116 et al., of the Public Utilities Commission of the State of California.

This decision will be printed for general distribution. The attached copy should be completed by inserting the decision number on the first page and on appendix and tariff pages, the effective date on tariff pages, and by inserting the place, date and names of signing Commissioners on the last page of the order. The insertion information is as follows:

Decision 83-06-083 Case 5438, OSH 116 et al.

Signed at San Francisco, California, June 29, 1983

Effective date for tariff pages July 29, 1983

Signed by: LEONARD M. GRIMES, JR.
President
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I will file a concurring opinion.
/s/ PRISCILLA C. GREW
Commissioner

I will file a dissent.
/s/ DONALD VIAL
Commissioner

I will file a dissent.
/s/ WILLIAM T. BAGLEY
Commissioner

Decision

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of Investigation for the purpose of considering and determining minimum rates for transportation of fresh or green fruits and vegetables and related items statewide as provided in Minimum Rate Tariff 8-A, and the revisions or reissues thereof. Case 5438, OSH 116 (Filed April 12, 1977).

And Related Matters. Case 5438, Pet. 129 (Filed June 29, 1982); Case 5438, Pet. 130 (Filed July 15, 1982); Case 5438, Pet. 131 (Filed September 29, 1982); Case 5438, Pet. 132 (Filed October 29, 1982).

(See Appendix A for appearances.)

Interim Opinion

Case (C.) 5438, Ordering Setting Hearing (OSH) 116 was instituted for the purpose of exploring whether the Commission should establish a regulatory program whereby carriers performing transportation subject to Minimum Rate Tariff (MRT) 8-A would establish rates and initiate changes in rate levels. C.5438, OSH 116 was initially heard on a consolidated record with 24 other minimum rate cases but got only as far as deciding how to implement SB 860, which amended the Public Utilities (PU) Code to eliminate the radial highway common carrier classification. That phase of C.5438, OSH 116 was terminated by Decision (D.) 89575 and D.92013. This decision deals with the rate reregulation phase of C.5438, OSH 116 and was heard on a consolidated record with the petitions listed next in order.

C.5438, Petition (Pet.) 129 is a petition by the California-Arizona Citrus League (CACL) requesting that fresh citrus be exempt from the provisions of MRT 8-A.

C.5438, Pet. 130 is a petition by the Western Growers Association (WGA) requesting that all mileage restrictions found in Item 40-series of MRT 8-A be eliminated. At the hearing WGA withdrew this petition and requested the petition be dismissed.

C.5438, Pet. 131 is a petition by the California Grape & Tree Fruit League (GTFL) requesting that fresh grapes and deciduous tree fruit be exempt from the provisions of MRT 8-A.

C.5438, Pet. 132 is a petition by WGA requesting that fresh fruits and vegetables be exempt from the provisions of MRT 8-A.

Oral argument was held before the Commission en banc on June 16, 1983.

Commission Reregulation Program

C.5438, OSH 116 is one of a series of cases in which the Commission has sought to determine whether or not a particular minimum rate tariff should be abolished in favor of a system of carrier-set rates. Beginning in April 1980, the Commission embarked on its program of rate reregulation. To date, MRTs 1-B, 2, 6-B, 9-B, 10, 11-A, 12-A, 13, 15, 18, and 19 have been cancelled by the following revisions:

Decision Nos.	*Cancelled*
D.90354, amended by D.91861	MRTs 6-B and 13, effective 7-31-1980
D.90663, amended by D.90861	MRTs 1-B, 2, 9-B, 11, 15, and 19 effective 4-30-1980
D.82-02-133	MRT 18, effective 5-18-1982
D.82-03-134	MRT 10, effective 4-1-1982
D.82-04-108	MRT 12-A, effective 6-20-1982

Carriers formerly subject to those tariffs now operate under a system of carrier-set rates. In the decisions which cancelled the minimum rate tariffs, the Commission determined that the minimum rate system had become outdated and unmanageable.

Among the findings in certain of the decisions were:

1. Conditions now are different from those at the inception of minimum rates in the 1930's;
2. Adjustments to the minimum rates cannot be made with the necessary frequency to fully cover escalating costs;
3. There is no way to identify the "efficient" carriers to determine true minimum rates;
4. The minimum rates are only average rates of average carriers;
5. Varying shipper and carrier conditions and requirements cannot be fully considered when minimum rates are based on industry averages; and
6. Shippers and carriers have benefitted from rate flexibility and responsiveness experienced in transportation exempt from minimum rates.

In addition, certain decisions provided that the Commission would institute a program to monitor the effect of reregulation on the carriers involved to ensure that their rate practices and rate levels were reasonable and compensatory.

Scope of MRT 8-A

MRT 8-A names Commission-established minimum rates and rules for the transportation of fresh fruits (including nuts), fresh vegetables, and empty containers by highway contract carriers and agricultural carriers (permitted carriers). The tariff applies principally to secondary (shed-to-market) shipments, i.e., shipments from packing sheds, pre-

cooling plants, and cold storage plants to wholesale produce markets and grocery chain warehouses in urban centers. The tariff exempts from its application intitial [*sic*] (field-to-shed) shipments, i.e., shipments from a field where the commodity is grown to an accumulation station, to a pre-cooling plant, to a winery, or to a cold storage plant for interim storage prior to movement to a cannery. The field-to-shed exemption also applies to movements to a packing plant, cold storage plant, or packing shed, subject, in some instances, to mileage limitations.

Rates applicable to transportation covered by MRT 8-A act as a floor below which highway common carrier tariff rates covering similar transporation cannot go except when specifically authorized by the Commission (PU Code §§ 726 and 3663).

PU Code st§ 726 and 3361 declares that it is the policy of the State in ratemaking to be pursued by the Commission to establish rates which will promote the freedom of movement by carriers of agricultural commodities "at the lowest lawful rates compatible with the maintenance of adequate transportation service."

Events Leading to Establishment of MRT 8-A

Exhibit 1, introduced by the Commission staff, reviewed the history of minimum rate regulation in California for the transportation of fresh fruits and vegetables by highway carriers. The review notes that while highway common carriers have been required by the PU Code since 1917 to file with the Commission their tariffs naming their rates, including rates for the transportation of fresh fruits and vegetables, it was not until the enactment of the Highway Carriers' Act in 1935 that permitted carriers were brought under the Commission's regulatory jurisdiction. Thereafter, the rate regulation of these permitted carriers and highway com-

mon carriers was determined by the Commission to be best served by the Commission publishing a series of tariffs setting forth minimum rates and rules to be followed by permitted carriers.

In 1938 the Commission opened C.4293, a proceeding to establish minimum rates for the transportation of agricultural products. The staff's review describes the conditions prevailing in the for-hire truck transportation of fresh fruits and vegetables at the time of and pending the outcome of C.4293 as follows:

> "They [permitted carriers] were free to negotiate the level of rates as agreed upon with the grower, broker or commission merchant. The inequality in pricing capabilities between common carriers and economically unregulated carriers, and between the unregulated carriers themselves, inevitably led to a fierce competitive environment which fostered rate cutting practices and which affected both the established common carrier's ability to provide adequate and dependable service to the agricultural industry, but also seriously impacted the ability of growers and wholesalers to market and sell maximum quantities of produce at the lowest prices consistent with the supplies available. The evidence taken in the early proceedings which led to the establishment of minimum rates for the transportation of fresh fruits and vegetables in replete with testimony by carriers, growers, brokers and commission merchants which recited the destructive practices of the unregulated carriers and the effect of such practices on the for-hire carrier and agricultural industry. The record is clear in those early proceedings that minimum rates were necessary to overcome destructive and predatory pricing by unregulated carriers and to provide for a rate structure which was conducive to the maintenance of an adequate and dependable facility, upon which

the agricultural industry was so inextricably dependent. The record in those early proceedings reveals little argument among either carrier or agricultural interests, as to the need for the Commission to establish minimum rates for the transportation of agricultural commodities."

D.33977, dated March 11, 1941, in C.4293 established the first minimum rate tariff applicable to the transportation of fresh fruits and vegetables and was the forerunner to MRT 8-A.

Revenue Statistics

The staff's Exhibit 1 shows that for the calendar year 1980, highway carriers having a per-carrier taxable revenue under PU Code §§ 5001-11 of $25,000 or more reported an aggregate revenue from the intrastate transportation of fresh fruits and vegetables of $227,377,815. Of that aggregate revenue, $167,225,143 (74%) was derived from exempt field-to-shed hauling and the balance of $60,152,672 (26%) was derived from nonexempt shed-to-market hauling. Highway common carrier transportation of fresh fruits and vegetables accounted for only $7,013,322 (3%) of the aggregate revenue. Only 271 carriers reported revenue generated from movements subject to MRT 8-A and only two carriers reported revenue earned under special authority to deviate from the rates in MRT 8-A under PU Code § 3666. Table 5 of Exhibit 1 shows a breakdown of the aggregate revenue of $227,377,815 into revenue brackets as follows:

Taxable Revenue From all Sources	*Carriers*	*% of Total Carriers*	*Total Revenue Fresh Fruits/Veg.*	*% of Total Revenue*
Under $5,000	100	9.7	$ 183,651	0.1
$5,000 But Less than $10,000	41	4.0	319,244	0.1
$10,000 But Less than $25,000	79	7.6	1,350,552	0.6

$25,000 But Less than $50,000	263	25.4	9,326,325	4.1
$50,000 But Less than $100,000	204	19.7	14,329,458	6.3
$100,000 But Less than $200,000	124	12.0	17,312,669	7.6
$200,000 But Less than $500,000	114	11.0	36,006,858	15.8
$500,000 But Less than $1,000,000	64	6.2	46,057,314	20.3
Over $1,000,000	45	4.4	102,491,744	45.1
Totals	1,034	100.0	$227,377,815	100.0

Traffic Data

In 1980, the State's leading fresh fruit and vegetable crop was iceberg lettuce, followed by oranges, table potatoes, celery, carrots, tomatoes, cantalopes, table grapes, and lemons in that order. Each of the state's 58 counties has a part in the production of fresh vegetables but the greater proportion is produced in 30 counties which are geographically dispersed from the State's border on the north to the border with Mexico on the south. These principal producing districts constitute valley areas of highly productive acreage. The production of many vegetable crops is restricted to harvesting periods which are of relatively short duration. However, the geographic dispersement of growing areas allows for a continuous supply of certain vegetables throughout the year, such as artichokes, broccoli, cabbage, carrots, cauliflower, spinach, and potatoes. The California share of U.S. total vegetable production in 1981 was 45%, amounting to 12 million tons. It is estimated that 18% of California's total vegetable production is consumed in California, which for 1980 represented 2,236,347 tons.

In 1980 California produced 11,303,800 tons of fresh fruits and nuts, of which 18% (2,028,438 tons) was consumed in California. Fresh citrus has no single harvest season and is shipped throughout the year.

After fresh fruits and vegetables are packed and/or precooled they are transported from packinghouses or precooling facilities as follows:

(a) By motor carrier to ports in California for transshipment by common carrier vessel to destinations in foreign countries;

(b) By motor carrier to wholesale and retail outlets outside California;

(c) By railroad to retail and wholesale outlets outside California;

(d) By motor carrier to California trailer-on-flatcar railroad terminals for shipment by railroad to destinations outside California; and

(e) By motor carriers to retail and wholesale outlets within California.

None of the above railroad or truck transportation is subject to rate regulation[1] except the intrastate truck movements from packinghouses or precooling facilities to retail and wholesale outlets in the State.

Truck Transportation Characteristics of Fresh Fruits and Vegetables

Rate-exempt field-to-shed and rateable shed-to-market intrastate truck transportation of fresh fruits and vegetables in California are characterized and contrasted as follows:

	Field-to-Shed	Shed-to-Market
1. *Commodity*	Low Value, unprocessed, less perishable in transit, unpackaged in bulk	Enhanced in value, in standard form, packaged, processed, usually not bulk (except some citrus & melons).

[1]See 49 U.S.C. § 10526(6) and Interstate Commerce Commission Ex Parte D.346(1) respecting rate exemption of interstate and foreign commerce movements by truck and railroad.

		Field-to-Shed	Shed-to-Market
2.	*Carrier*	Tends to be migratory, more subhauler use.	Tends to be stable, less subhauler use.
3.	*Charges*	No regulations, payment may be delayed pending harvest season.	Rate regulations (includes unit of measurement, weights, credit, documents, split shipments, COD's, and accessorials).
4.	*Equipment*	Characterized by flat beds with bins, unrefrigerated, gravity, machine loading/unloading.	Refrigerated vans.
5.	*Distance*	Relatively short (point-of-growth to initial processing).	Longer runs to market consumption areas. Continuous prolonged operations.
6.	*Origins*	Many beyond public highway.	On public highways, fixed origins and destinations.

Contrasting characteristics between California intrastate shed-to-market truck movements and interstate shed-to-market truck shipments are as follows:

		Intrastate	Interstate
1.	*Distances*	200-300 miles to most major markets.	2,000-3,000 miles to most major markets.
2.	*Rate Levels*	Stable rates which don't vary seasonally and which contemplate empty return trips.	Vary according to season and equipment availability. Do not contemplate empty return trips.
3.	*Round trips*	Many round-trip opportunities possible in one day.	Many round trips to be 2 to 3 weeks.
4.	*Backhauls*	Short trips present little time or opportunity to secure and handle backhauls. Does not have to alter operations to accommodate backhauls.	Longer trips make more markets accessible. Greater opportunity to secure and time to handle backhauls which are needed for successful operations.

		Intrastate	Interstate
5.	*Equipment*	Refrigerated vans.	Refrigerated vans.
6.	*Broker*	Brokers are not necessary as carriers are available for easy direct contact and quick service response.	Suitable for broker handling. Carriers on long distance hauls are unavailable for quick service response.
7.	*Domicile*	Usually in California.	Many outside California, some in California.
8.	*Availability*	California carriers are available for direct shipper contact. Carriers can respond quickly. Service at stable rates helps promote availability of sufficient equipment needed to service perishable crops.	Non-California carriers are not tied-into California economy. Are usually unavailable for quick contact and service response. Varying and uncertain rate levels do not promote adequate equipment availability to assure service to California perishable commodity shippers.

Rate Relationships

GTFL, in its Exhibit 5, introduced a study it had made covering the 1982 grape shipping season contrasting the total freight charges assessed on interstate shipments of grapes of various weights from Waddell, Arizona, a grape shipping point, to Los Angeles and South San Francisco with the total freight charges on similar weighted shipments of grapes assessed under MRT 8-A from Coachella, California to the same destination points. On the three shipments from Coachella to South San Francisco (535 miles) the total freight charges assessed exceeded those from Waddell to South San Francisco (796 miles) by $68.78, 59.31, and $1.01. On six less-truckload shipments from Waddell to Los Angeles (398 Miles) the total freight charges exceeded those from Coachella to Los Angeles (136 miles) by only $0.94, $18.05, $6.65, $0.94, and -$9.23 respectively.

Sunkist Growers, Inc., testifying for CACL, introduced a study (Exhibit 2) contrasting the interstate exempt drayage charges on citrus to the railroad piggyback ramps at Fresno and Los Angeles with those which would have to be charged under MRT 8-A had the movements been in intrastate commerce. From the 13 origin points embraced in the study covering shipments to Fresno, the MRT 8-A charge would be on the average 48.4% higher than the interstate charge. From the 18 origin points embraced in the study covering shipments to Los Angeles the MRT 8-A rates would be on the average 42.9% higher than the interstate rates. Exhibit 2 also contained a study which showed that from 31 specific origin points to Long Beach Harbor the average charges per export container would be 23.7% higher if the MRT 8-A rate would have to be charged in lieu of the exempt foreign commerce charge.

Kelseyville Packing Co. (Kelseyville) of Kelseyville, Lake County, appeared for the Lake County Pear Association. Kelseyville's witness stated (Exhibit 7) that pear shippers in Lake County are required by MRT 8-A to pay the equivalent of $1.05 per 36-pound carton of pears from Lake County to Los Angeles, while the going interstate rate from Medford, Oregon to Los Angeles—203 miles further than from Lake County—runs between $0.85 and $0.98 per 36-pound carton of pears. The going interstate rate of pears from Yakima, Washington to Los Angeles averages $1.20 per 36-pound carton or only $0.15 more per carton than for Lake County shippers, though Yakima is twice as far as Lake County from Los Angeles. A similar rate imbalance exists on pear shipments from Washington and Oregon to San Francisco.

Sun World handles 40 different kinds of fresh fruits and vegetables. It points out that under MRT 8-A it pays $0.32 per carton of dates to ship to the Los Angeles market from

Coachella whereas the going rate is only $0.23 per carton to ship from Coachella to the Los Angeles Harbor for export.

Pure Gold, Inc. introduced into evidence Exhibit 9 which consisted of bills of lading and freight bills covering randomly selected shipments of citrus which it had shipped in 1982 from Redlands, Lindsay, and Orosi to Port Hueneme, San Francisco, San Pedro, Terminal Island, and Long Beach for export. The exempt foreign commerce truck charges actually paid and the charges it would have had to pay under MRT 8-A if the shipments had moved in intrastate commerce to and from the same points are as follows:

	Actual Charge Paid Each Shpmt	*Charge if Shipment Rated Under MRT 8-A*	*Excess Charge Under MRT 8-A*
From Redlands- 2 shipments	$315.00	$382.36	$ 67.36
From Lindsay 8 shipments	396.00	494.03	98.03
From Lindsay- 1 shipment	400.00	463.63	63.63
From Orosi- 1 shipment	425.00	498.05	73.05
From Orosi- 3 shipments	425.00	528.90	103.90

Results of Staff Field Study

During 1980 and 1981 a field study was conducted by the staff to gather information regarding the transportation of fresh fruits and vegetables in order to advise the Commission whether it should establish rates and initiate changes in rate levels. Interviews were conducted with 30 carriers, 7 shippers, and 5 associations. The names of those interviewed are listed in Appendix A of Exhibit 1. The 30 carriers interviewed each had gross revenue from hauling fresh fruits and vegetables which fell within the following revenue

brackets:

Total Taxable Revenue-All Sources	*No. of Carriers*
Over $1,000,000	8
$500,000 but less than $1,000,000	9
$200,000 but less than $500,000	7
$100,000 but less than $200,000	5
$ 50,000 but less than $100,000	–
$ 25,000 but less than $ 50,000	1

In its field study the staff proposed three alternatives for a future economic regulatory policy and asked those interviewed for comments on each of the alternatives. The alternatives were:

1. Retain the present minimum rate system.
2. Economically deregulate rates entirely and cancel MRT 8-A.
3. Cancel MRT 8-A, institute a Transition Tariff (TT) 8-A as a threshold tariff, and require carriers to file a schedule of rates with the Commission for the services they intend to perform.

There follows an outline of the proposed alternatives and the comments reviewed by the staff.

Alternative 1

Continuance of the present minimum rate system. MRT 8-A would continue in effect and would be subject to periodic adjustment, and would be reviewed for possible modifications to accommodate current conditions.

Most carriers interviewed favored retention of the minimum rate system stating that it has enabled small carriers to enter the field; that compensation must be adequate in order for carriers to update and maintain equipment; that it is difficult for small carriers to develop cost information; that it prevents destructive rate cutting; and that an adequate supply of equipment is available to move produce at peak periods.

Shippers believe that MRT 8-A rates were too high, thus providing an "umbrella" for inefficient carriers; that most produce carriers are not unionized, but costs used in minimum rate studies are based on union labor; and that the mileage limitations for exemptions in Item 40 are unrealistic in light of current conditons.

Alternative 2

Economic deregulation. This alternative would allow rates to be negotiated between shippers and carriers, with no established maximum or minimum level. MRT 8-A would be canceled no later than April 30, 1983. Carriers would then embark on a system of market-set rates for the transportation of fresh fruits and vegetables in California without the requirement to file individual tariffs, schedules, or contracts and without Commission approval as to the level of their rates. The Commission would monitor carrier-established rate levels both retrospectively and prospectively in order to ascertain the effects of deregulation on the transportation of fresh fruit & vegetables.

The majority of carriers interviewed opposed rate deregulation. They were concerned that destructive competition would bring about rate wars with widely fluctuating rate levels. Carriers feared that equipment maintenance would be reduced, worn out equipment would not be replaced, truck shortages would occur at peak periods, and drivers would be forced to drive excessive hours.

The remaining carriers were more optimistic, expressing the opinion that rates would eventually stablize [*sic*]; that shippers are willing to pay a fair price for good service; and that carriers and shippers would arrive at a "modus vivendi" with respect to rates.

Shippers' representatives believe that once carriers were removed from the "umbrella" of minimum rates, shippers

and carriers could bargain more astutely; that exempt interstate traffic moved without major problems; and that paperwork and its related expenses could be reduced through verbal agreements.

Most shippers interviewed believe that service was the primary consideration in carrier selection. Some equated service with rates in their selection process. Very few believe the rate level outweighed service. Many of the shippers recognized or acknowledged that carriers had to be properly compensated for their efforts. Those shippers are willing to pay a premium to a carrier with a record of dependability. The feeling of many shippers was that dependable carriers are known in the industry and deregulation would not affect those carriers.

Alternative 3

Require carriers to establish and file a schedule of rates. Carriers would set their own rates at or above the level of TT 8-A, or adopt TT 8-A as their own schedule of rates with exceptions, if any, to be noted in their individual filings. The rates would be fixed rates. Increases would require the filing of a revised schedule of rates. The transition tariff would expire in about a year unless it can be seen from a monitoring program that the effects of reregulation are detrimental to the industry or to the public. Upon expiration of the transition tariff, carriers would be free to set rates at any level they choose. The monitoring program would evaluate rate levels and assess their reasonableness.

This alternative is a system of carrier filed tariffs of exact rates and charges. Most carriers opposed this system, feeling that rate flexibility is needed; and that the effort and expense of filing tariffs would be a hardship.

Carriers favoring this alternative felt that it would enable carriers to know what their competitors are charging and

that it would be workable if tariff filing requirements were uniform. Some shipper representatives thought this would be a workable system while others believe that it involved too much regulation and that more flexibility is needed.

Staff Conclusions and Recommendations of Future Regulatory Policy

In the staff's judgment, the transportation of fresh fruits and vegetables exhibits many unique characteristics which set it apart from other types of transportation. However, these unique characteristics are not sufficiently intensive to justify retention of the minimum rate system.

The staff concludes from its field study and interviews with those who would be primarily affected by regulatory change—carriers and shippers—that opinion is divided regarding economic deregulation. The majority of carriers hold to the traditional viewpoint and prefer the continuance of the minimum rate program. Many of these pro-minimum rate carriers fear the oft-stated concern that deregulation would initiate predatory rate-cutting practices, leading to an unstable carrier economy, deterioration of service, and an abnormal turnover of carriers. The remaining carriers do not feel threatened by the concept of deregulation. They are of the opinion that they would be able to compete at rate levels which would be compensatory, based on the belief that shippers value dependable carrier services and are willing to agree to rate levels which are commensurate with good service.

The staff contends that strong support for deregulation comes from the experience gained in the interstate scene, specifically concerning transportation of agricultural commodities. The staff points to a study presented to the National Symposium on Transportation for Agriculture and Rural America in 1976 which found that carriers hauling

exempt agricultural commodities served their shippers well and remained in business for many years, demonstrating profitability, demand responsiveness, dependability and stability in that carrier industry.[2] The characteristics of the carrier industry in the study were much the same as those of California carriers. The study stated that there was insufficient evidence to conclude that regulated carriers performed differently from exempt carrers hauling exempt commodities, but that "the agricultural exemption" has led to a competitive, efficient provision of transportation service to agricultural shippers and producers.

The staff argues that the continuation of minimum rates in California for the transportation of fresh fruits and vegetables is a contradiction to the fact that over 73% of the revenue earned by produce carriers in California is exempt from minimum rates. Since such a large percentage of the transportation of agricultural commodities is exempt, and moves from point of origin to destination without apparent disruption, the staff concludes that it is inconsistent regulatory policy to continue to regulate the remaining 27% of the traffic which could operate in an environment of deregulation much the same as the majority of traffic involving agricultural commodities. The staff, therefore, recommends that MRT 8-A be cancelled no later than April 30, 1983 based on the following rationale:

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[2]James C. Cornelius, "An Assessment of the Economics of Motor Carriers of Exempt Agricultrual Commodities," in *proceeding* [sic] *of the National Symposium on Transportation for Agricultural and Rural America* (New Orleans, jointly sponsored by State Agricultural Experiment Stations, The Farm Foundation, Upper Great Plains Transportation Institute, U.S. Department of Agriculture and U.S. Department of Transportation, November 15-17, 1976). Professor Cornelius was then with Montana State University, Bozeman, and is now Associate Professor of Agricultural and Resource Economics, Oregon State University, Corvallis, OR 97331 (Telephone 503-0754-2942) [*sic*].

"1. Strong support for deregulation of minimum rates comes from the interstate experience which allows for negotiated rates and which has proven to be dependable and stable.

"2. By virtue of the fact that over 73% of the revenue earned by California agricultural carriers is presently rate exempt, it is inconsistent to regulate the remaining portion of the traffic which is currently subject to minimum rates.

"3. Shippers value dependable carrier service and are willing to agree and negotiate rate levels with carriers which are commensurate with good service.

"4. Cancellation of MRT 8-A will continue the Commission goals of a movement towards free market competition as demonstrated by the cancellation of several other minimum rate tariffs."

The staff also recommends that if the Commission institutes any reregulatory or deregulatory program, the staff be required to monitor the effects of the program on the carrier-shipper industry. The Public Utilities Code charges the Commission with the responsibility of assuring "such rates as will promote the freedom of movement . . . of agricultural commodities . . . at the lowest rates compatible with the maintenance of adequate transportation service." The staff believes that it is necessary that the staff stand ready to assume an active role in ratemaking should service suffer as a result of deregulation. By monitoring rate levels and industry performance, the staff would remain knowledgeable about conditions in the industry and be able to identify any problems and recommend modification to the program should the need arise.

Position of Petitioners

Petitioner CACL is a trade association of shippers and handlers of most of the fresh citrus fruit grown in California and Arizona. Petitioner GTFL is a nonprofit service organization for growers and shippers which ship approximately 80% of all fresh grapes and deciduous tree fruits that are transported from California and Arizona origins in interstate and intrastate commerce. Petitioner WGA is a nonprofit trade association comprised of approximately 950 members who grow, ship, and pack over 80% of the fresh fruits and vegetables produced in California and Arizona.

Petitioners contend that the free market can and should determine the rates for transporation of fresh fruits and vegetables not subject to MRT 8-A, just as the free market determines the rates for interstate and foreign transportation of those commodities. Petitioners argue there is no logical reason to regulate one type of intrastate transportation when nonregulation has proven successful with respect to interstate transportation of those commodities. They claim that regulation of the produce in shed-to-market movements has led to much higher rates than the rates charged in unregulated transportation. Petitioners' members or their customers have paid substantially higher rates for intrastate transportation regulated by MRT 8-A than has been paid for the near identical type of packinghouse-to-port transportation within California.

Petitioners claim the nature of fresh fruit and vegetable transportation makes minimum rates particularly inappropriate. Many fresh fruits and vegetables have various harvest seasons, depending on the commodity and growing region within the State. Consequently, during peak harvest seasons for many such products, demand for trucks is higher and higher rates must be paid. However, in nonpeak periods,

demand for trucks are low and during these slack periods shippers should not be forced to pay artificial rates when market forces dictate a lower price.

For these principal reasons petitioners request that the commodities involved in their petitions be exempted from MRT 8-A and join the staff in its recommendation to cancel MRT 8-A.

Kelseyville, Sun World, and Mendelson-Zeller, who are engaged in shipping one or more of the commodities included in the petitions, gave testimony in support of granting the petitions. Safeways Stores and Lucky Stores support the granting of the petition as well as supporting the staff's recommendation to cancel MRT 8-A.

Positions of Those Opposed to Cancellation of MRT 8-A

The business agent for Local 70 of the International Brotherhood of Teamsters testified that his interest in the proceedings was his concern that if MRT 8-A was cancelled the 30 to 40 lumpers (unloaders) his local represented, as well as the other 110 unloaders represented by other Teamster locals in the Bay Area, would experience a substantial diminution of revenue, due to lower freight rates, to the extent that they would have insufficient revenue to pay their benefits and live at a decent level. He stated that for the past 6 years there has not been a change in the unloading charges in the area and that his union is presently in the process of trying to get an increase in those charges. He felt that cancellation of MRT 8-A would result in the less revenue to the carriers which in turn would be detrimental to the bargaining position of the unloaders. He stated that unloaders, who operate as independent contractors in the unloading area of produce markets, are registered with the State and own their own unloading equipment, such as rollers and forklifts. Unloaders are paid by the trucker at whose

request the truck is loaded. The witness contends that it is vitally important to the unloaders that there be some system whereby the rates received by the carriers generate sufficient income for the carrier to pay unloaders a decent unloading charge so that the unloader can continue to receive income sufficient to pay their benefits, which the unloaders must pay themselves. Rather than deregulation of the MRT 8-A rates, the witness would rather see the institution of a carrier-filed rate system with cost justification based on prevailing wage, such as the Commission instituted with regard to general freight rates; though, for the protection of his members, he would prefer to see MRT 8-A remain in effect.

Rogers Motor Express, Northern Refrigerated Transportation, Inc. and Frank Hlebakos & Sons Transportation Co., Inc. collectively oppose the cancellation of MRT 8-A for the same reasons stated in the staff study. In addition, they stated that many carriers are not as astute or experienced at bargaining over rates as are many of the large shippers and receivers and therefore those carriers are in a disadvantaged position. However, the three carriers recommend that if the Commission intends to cancel MRT 8-A that the Commission establish a transition tariff, such as TT 2, but of shorter duration than the latter tariff, in order to allow the carriers to gain experience in the bargaining.

Position of California Trucking Association (CTA)

The CTA witness testified that the Produce Carrier Conference (PCC) of CTA recently met and determined its position on the continued regulation, reregulation, or deregulation to be as follows: "Support the cancellation of MRT 8-A concurrent with the time that the Commission has fully removed itself from all regulation and jurisdiction over produce carriers." He testified that the feeling of the PCC is that minimum rate regulation is only part of the Com-

mission's current regulation of the produce carrier industry. Hence, cancellation of MRT 8-A is not full deregulation of that industry but still leaves carriers surrounded by rules and regulations which work to the detriment of the industry. Even if MRT 8-A is canceled carriers would still be bound by continuing Commission regulation of their services in C.O.D. and subhauler bond amounts, common carrier produce rates, uniform system of accounts, insurance standards, taxes, and in many other areas. PCC and CTA feel that cancellation of MRT 8-A is asking produce carriers to walk the plank. Instead, the Commission should support legislation to completely free produce carriers from Commission regulation. Only then can produce carriers enjoy the fruits of free market competition that proponents of cancellation of MRT 8-A envision. Lacking such full deregulation only shippers would be deregulated; carriers would continue to be subject to Commission regulation. Until such time as the full free marketplace competition is accomplished PCC and CTA are opposed to cancellation of MRT 8-A because they believe it is an incomplete package which would work to the carriers' detriment.

Discussion

Of the 1,034 reporting revenue from hauling fresh fruits and vegetables in 1980 only 273 carriers chose to handle any of those commodities in rate-regulated movements. Evidently, it is much more popular among carriers transporting fresh fruits and vegetables to stay in the rate-exempt hauling field than it is to engage in a mix of rate-exempt and nonrate-exempt hauling or to engage exclusively in nonrate-exempt hauling. While there may be cogent reasons for this popularity, we have been presented with no evidence that in the rate-exempt field of hauling fresh fruits and vegetables there has been destructive competitive practices, serious

equipment shortages, inadequate number of carriers, unstable carrier economy, or inadequate compensation paid to carriers. Furthermore, we think implausible the argument in favor of keeping MRT 8-A that is difficult for small carriers to develop cost information. One need only contrast the number of carriers drawn to the rate-exempt hauling field in California with the much lesser number of carriers who have opted to haul under MRT 8-A to see this argument lacks foundation. If field-to-shed hauling can flourish under our long standing policy which allows carriers to haul at carrier-shipper agreed rates, without Commission intervention, we see no reason why that policy cannot successfully and beneficially be extended to the transportation of the same commodities, though now packaged or crated, in shed-to-market hauling. Certainly, in the much broader field of interstate hauling of agricultural commodities, the lack of economic regulation has not been shown to be detrimental to carriers, shippers, or consumers.

The evidence shows that the charges produced by the going interstate and foreign commerce exempt truck rates are substantially below those which would be produced by MRT 8-A between the same California points. Also, the relationship between the lower charges produced by the going interstate exempt rates from shipping points outside of the State to major consuming areas in the State and the charges produced by the higher MRT 8-A rates between California origin points and the same major consuming areas unduly discriminate in favor of the out-of-state shipper to the prejudice of the California shipper and consignee. We are convinced that the continued economic regulation of intrastate transportation rates of fresh fruits and vegetables will not promote the freedom of movement of agricultural commodities "at the lowest rates compatible with the maintenance of adequate transportation service," but that such

promotion will be brought about by cancelling MRT 8-A and allowing carriers to haul at carrier-shipper agreed rates without Commission interference.

We do not think it appropriate in this case to establish a transition tariff covering fresh fruits and vegetables. Produce carriers, in the main, have been operating in an environment of exempt rates for some time. As the staff has shown, 74% of the revenue derived from the intrastate hauling of fresh fruits and vegetables comes from rate-exempt traffic and only 271 carriers out of the myriad carriers who engage in hauling the subject commodities engage in rate regulated hauling. Also, produce moving from in-state points to California ports for export to foreign countries moves at exempt rates as do all truck shipments of produce moving in interstate commerce to and/or from California points. Hence, we see little need for establishing a transition period during which carriers can get used to the idea of hauling at exempt rates, as the majority of carriers presently are used to hauling at exempt rates.

While it is true, as CTA points out, that cancellation of MRT 8-A will not completely release produce carriers from Commission jurisdiction, what regulation remains after MRT 8-A is cancelled is primarily administrative in nature and should in no way impede carriers and shippers in their free exercise of coming to an agreement over rates. Additionally, cancellation of MRT 8-A does not mean that we are giving up our jurisdiction to establish produce truck rates. As suggested by the staff, we will order the staff to set up a system to monitor the effects of our produce rate deregulation program. If it should be found that service suffers as a result of this program we will reassert our jurisdiction to cure whatever ills are found to exist in the program.

Unloading charges at larger produce markets are established under the provisions of Food and Agricultural Code

Sections 57031 and 56951. Hence, if a carrier employs an unloader at the produce market he must pay an unloader charge regardless of whether or not the commodities unloaded moved under tariff rates. Teamsters presented no evidence of any problems its unloaders have with collecting unloader charges from interstate produce carriers who haul under exempt rates. Evidently, there is no problem with interstate carriers. We foresee no collection problem if MRT 8-A is canceled. Certainly, unloader charges are well known to produce carriers serving the markets and they could just as certainly include those expenses, as well as all other expenses, in any rate the carrier quoted to the shipper.

Teamsters' fears that cancellation of MRT 8-A will have a detrimental effect on Teamster negotiations to increase unloader charges because the level of produce hauling charges may decrease after the tariff is canceled. As required by MRT 8-A Item 150, unloader charges must be itemized separately on the carrier's freight bill. Hence, unloader charges are passed on directly to the party charged with paying the freight bill. We do not anticipate that carriers will change this practice upon cancellation of MRT 8-A. Since carriers merely act as a conduit for collecting and paying the unloader charges we do not believe a lower level of produce hauling charges will have any serious effect on the level of unloader charges.

CTA and Certified Freight Lines, Inc. (Certified) filed petitions to set aside submission and reopen these proceedings. CTA argues that the entire question of deregulation of MRT 8-A should be reevaluated and additional evidence taken. Certified asserts that the impact of deregulation on less than truckload lot (LTL) shipments was inadequately addressed at hearing. Although it did not participate in the evidentiary hearings, it now suggests that truckload shipments of produce should be deregulated but that rate reg-

ulation should be retained for less than truckload lots.

No good cause has been shown for granting CTA's petition and we will deny it. We will also deny Certified's petition since we lack an adequate evidentiary record to determine a cutoff point between LTL and truckload shipments. Rather than delay deregulation of MRT 8-A pending development of that information, we will proceed with cancellation of MRT 8-A but will keep this proceeding open so that any party, including the staff, wishing to present evidence on the impact of deregulation on LTL, may file a notice of its intent to do so in 30 days. We will determine at that time whether to hold further hearings on this subject.

Findings of Fact

1. MRT 8-A names minimum rates, charges, and rules which apply principally to shed-to-market transportation.

2. Field-to-shed movements are largely exempt from the application of MRT 8-A.

3. Seventy-four percent of the intrastate revenues generated by highway carriers in transporting fresh fruits and vegetables is derived from exempt field-to-shed hauling and the remaining 26% from shed-to-market hauling.

4. Only 273, or 25% of the 1,034 carriers who transport fresh fruits and vegetables choose to handle any of those commodities in rate-regulated movements.

5. The overwhelming majority of carriers who transport fresh fruits and vegetables do so only in rate exempt movements.

6. Highway common carriers hauling fresh fruits and vegetables under their certificates account for only 3% of the total annual revenue derived from the transportation of those commodities.

7. After fresh fruits and vegetables are packed and/or precooled they are transported from packinghouses or pre-

cooling facilities as follows:

(a) By motor carrier to ports in California for transshipment by common carrier vessel to destinations in foreign countries;

(b) By motor carrier to wholesale and retail outlets outside California;

(c) By railroad to retail and wholesale outlets outside California;

(d) By motor carrier to California trailer-on-flatcar railroad terminals for shipment by railroad to destinations outside California; and

(e) By motor carrier to retail and wholesale outlets within California.

8. The truck and rail movements listed in Finding 7(a)-(d) are exempt from rate regulation; only the movements listed in Finding 7(e) are rate regulated.

9. The level of MRT 8-A rates produce charges which are unduly discriminatory against California intrastate shippers as opposed to the lower level of the going interstate rates from nearby states into California.

10. Interstate and foreign commerce shed-to-market truck charges on shipments of fresh fruit and vegetables moving between points in California are substantially lower than those which would be produced under MRT 8-A if those shipments moved in intrastate commerce.

11. Adherence to MRT 8-A rates does not allow carriers the flexibility of moving produce in shed-to-market movements at the lowest rates compatible with the maintenance of adequate transportation service.

12. The majority of produce carriers oppose the cancellation of MRT 8-A for the reasons stated in the body of this opinion which usually are advanced against rate deregulation and in favor of rate regulation.

13. Experience in the area of rate exempt field-to-shed hauling has not revealed that carriers operating in this are are prone to engage in practices or to establish rates which are antithetical to the promotion of the freedom of movement of agricultural commodities at the lowest rates compatible with the maintenance of adequate transportation service.

14. It is inconsistent to regulate the rates for the shed-to-market movement of fresh fruits and vegetables when the field-to-shed movement of those commodities is not regulated.

15. For the future, the requirements of PU Code §§ 726 and 3661 can best be met by the cancellation of MRT 8-A.

16. There is no need to establish a transition tariff covering the transportation of fresh fruits and vegetables prior to the complete deregulation of produce rates of permitted carriers.

17. The staff, by monitoring rate levels and industry performance after the cancellation of MRT 8-A, will remain knowledgeable about conditions in the produce-hauling industry and be able to identify any problems and recommend modification to the rate deregulation program should the need arise.

18. Commission regulation of product carriers in areas other than rates should not impede carriers and shippers in their free exercise of coming to an agreement over rates.

19. There has been no showing that cancellation of MRT 8-A will put produce truckers in the position of being unable to pay unloader fees.

20. Because the harvest season of many fresh vegetables is near at hand the effective date of this order should be the date on which the Commission signs the order.

21. The following order complies with the guidelines in the Commission's energey efficiency plan.

22. It can be seen with certainty that there is no possibility that the regulatory system adopted may have a significant effect on the environment.

Conclusions of Law

1. The Commission is not required to establish Minimum Rate Tariffs under Division 2 of the PU Code.

2. Continuation of MRT 8-A will not further the State policy enunciated in PU Code §§ 726 and 3661 respecting the movement of agricultural commodities.

3. Establishment of a transition tariff to replace MRT 8-A will not further the State policy enunciated in PU Code §§ 726 and 3661 respecting the movement of agricultural commodities.

4. Cancellation of MRT 8-A will further the State policy enunciated in PU Code §§ 726 and 3661 respecting the movement of agricultural commodities.

5. MRT 8-A should be canceled July 29, 1983.

6. The request of petitioner GTFL to dismiss Pet. 130 should be granted.

7. Pets. 129, 131, and 132 should remain open pending examination of the impact of dereguation on LTL shipments.

8. The rates of any highway common carrier that has adopted MRT 8-A as its common carrier tariff will remain in effect after cancellation of MRT 8-A.

9. Although the policy provisions of the California Environmental Quality Act, California Public Resources Code, §§ 21000 and 21001, apply to these proceedings, the Environmental Impact Report provisions, California Public Resources Code, § 21100, et seq., do not.

10. The reregulation plan outlined in the body of this opinion is just and reasonable and should be adopted by the Commission.

11. Common carrier rate changes will be governed by PU Code §§ 452, 453, 454, and 455.

12. The Commission staff should be ordered to set up a program to monitor the rate levels and industry performance after the cancellation of MRT 8-A with a view to identifying any problems and recommending modification to this part of the rate deregulation program should the need arise.

13. No good cause has been shown to set aside submission and reopen these matters and the petitions to do so should be denied.

INTERIM ORDER

IT IS ORDERED that:

1. MRT 8-A is cancelled July 29, 1983, by Supplement 14 to MRT 8-A attached applicable to both truckload and less than truckload lots.

2. The Commission's Transportation Division staff shall set up a program to monitor rate levels and industry performance after the cancellation of MRT 8-A with a view of remaining knowledgeable about conditions in the produce-hauling industry and being able to identify any problems and recommend modifications to this rate deregulation program should the need arise.

3. Pet. 130 in C.5438 is dismissed.

4. Pets. 129, 131, and 132 in C.5438 remain open.

5. Any party, including the staff, wishing to present evidence on the impact of deregulation on LTL shipments shall file a notice of its intent to do so in original and 12 copies within 30 days. The notice shall be served on all parties. Upon review of such filings the Commission may at its discretion set further hearings and will set forth the nature and scope of evidence to be presented.

6. The petitions of California Trucking Association and Certified Freight Lines, Inc. to set aside submission are denied.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

LIST OF APPEARANCES

Petitioners: Tuttle & Taylor, Incorporated, by *Jeffrey M. Hamerling*, Attorney at Law, for California-Arizona Citrus League; *Daniel Haley*, Attorney at Law, for Western Growers Association; and Athearn, Chandler & Hoffman, by *Richard Harrington*, Attorney at Law, for California Grape & Tree Fruit League.

Interested Parties: *Armand Karp*, for Rogers Motor Express, Northern Refrigerated Transportation, Inc., and Frank Hlebakos & Sons Transportation Co., Inc.; *William D. Mayer*, for Del Monte Corporation; *Allen R. Crown* and Antone S. Bulich, Jr., Attorneys at Law, for California Farm Bureau Federation; *Richard W. Smith*, Attorney at Law, and J. D. Anderson, for California Trucking Association; *Robert Lawson*, for Lucky Stores, Inc.; *Alan Edelstein*, Attorney at Law, for California Teamsters Public Affairs Council; *Richard C. Quigley*, for Safeway Stores; *L. Filipovich*, for General Drayage; and *James J. Orf*, for himself.

Commission Staff: *Alberto C. Guerrero*, Attorney at Law.

(END OF APPENDIX A)

CANCELLATION SUPPLEMENT

SUPPLEMENT 14

TO

MINIMUM RATE TARIFF 8-A

NAMING

MINIMUM RATES AND RULES

FOR THE

TRANSPORTATION OF FRESH FRUITS,

FRESH VEGETABLES AND EMPTY

CONTAINERS OVER THE PUBLIC HIGHWAYS

BETWEEN POINTS IN THE STATE OF

CALIFORNIA AS DESCRIBED HEREIN

BY

HIGHWAY CONTRACT CARRIERS

AND

AGRICULTURAL CARRIERS

CANCELLATION NOTICE

Minimum Rate Tariff 8-A is cancelled. The rates of any highway common carrier that adopted Minimum Rate Tariff 8-A as its common carrier tariff shall remain in effect.

Decision No. 83-06-083 EFFECTIVE JULY 29, 1983

Issued by the

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

State Building, Civic Center

San Francisco, California 94102

COMMISSIONER PRISCILLA C. GREW, Concurring:

I concur with the decision which we have issued today. The petition of Certified Freight Lines and the comments of Certified and others in the recent oral arguments raise questions concerning the elimination of tariff provisions as they affect less than truckload (LTL) shipments. In my opinion, those questions were not adequately addressed on the official record before us. Are there significant economic distinctions between truckload and LTL shipments of fruits and vegetables? If such distinctions are present, do they suggest that shippers of LTL quantities would be best served by the continuation of minimum rate regulation?

I would have preferred to cancel the tariff immediately as it pertains to full truckload shipments, and to institute new hearings in which parties could present their positions on LTL regulation on the record. However, to do so would require the establishment of an accurate, workable definition of LTL shipments pursuant to the tariff. Since the record lacks any evidence as to how such a definition should be established, the Commission lacks the information necessary to draw the line between truckload and LTL. To define the regulatory boundary without evidence in the record might not merely impinge on the rights of some carriers and shippers. Since the Commission would have no assurance that the arbitrary cut-off would answer our concerns, we would have no assurance that some greater harm had been avoided.

Since we lack evidence on the record on which to establish a regulatory distinction between truckload and LTL, our only remaining choices are to retain the entire tariff pending further hearings or to cancel the entire tariff. To do the former would hold the remainder of the industry hostage to our LTL deliberations. I am unwilling to take that step. However, I encourage those concerned about LTL ship-

ments to actively participate in the continued hearings in this proceeding and to be prepared to present evidence on the record both as to the relevant distinctions between truckload and LTL shipments and as to whether reinstatement of minimum rate regulation would be appropriate for the LTL segment of the industry.

/s/ Priscilla C. Grew
PRISCILLA C. GREW, COMMISSIONER

San Francisco, California
June 29, 1983

DONALD VIAL, Commissioner and
WILLIAM T. BAGLEY, Commissioner, Dissenting:

We dissent from the majority position adopted today which totally cancels MRT 8-A. In our view, the presentations made during the recent oral argument raise serious questions about the quality of information we currently possess concerning the distinctions (if any) between truckload and less than truckload (LTL) shipments moving under this tariff.

The record is devoid of any information about the percentage of LTL versus truckload shipments subject to MRT 8-A, the identity and number of LTL shippers, and the nature, scope and timing of LTL movements. In addition, the record is devoid of the factual information necessary to define what constitutes LTL (as opposed to truckload) movements. We firmly believe that we should address these omissions before acting to cancel the tariff.

Equally important, the record is also inadequate because the staff did not examine the extent to which carriers of both truckload and LTL shipment pursue integrated tariff policies in order to maintain adequate transportation service for small shippers at the lowest compatible and lawful rates. There is nothing in Sections 726 and 3361 [*sic*] of the Public Utilities Code that suggests that priority in the application of state policy in ratemaking should be given to interests of large shippers at the expense of small shippers.

A careful analysis of the LTL issue *may* lead us to conclude that LTL traffic should be deregulated along with truckload traffic; similarly, our review of sorely needed additional information may lead us to the opposite conclusion. The point we wish to emphasize is that we should not change the status quo without resolving the LTL issue.

At least three commissioners agree that the record on the LTL issue is inadequate. (See Concurring Opinion of Com-

missioner Grew). We agree with Commissioner Grew that this record lacks an accurate, workable definition of LTL shipments; however, we believe that the Commission should act to develop such a record at this time rather than deregulating in ignorance of the consequences for small shippers.

We believe there are realistic procedural alternatives to total and immediate cancellation of MRT 8-A. For example, the Commission could take additional evidence, on an expedited basis, to establish an LTL definition. Once this had been accomplished the Commission would have a definition of the regulatory boundary and a sufficient basis for immediate deregulation of truckload traffic. Following this, the Commission could take evidence on the issue whether LTL traffic should or should not be deregulated. While this process would consume additional time, the hearing process, especially on the definitional issue, could be expedited and the delay minimized. There is no evidence in this record that such delay would harm the parties.

Undoubtedly, there are other procedural alternatives available to address the concerns we have raised. On an interim basis and while awaiting the needed precise information, the Commission under its general powers could establish a less than truckload lot to be less than 20,000 lbs. and, for such lots, continue the applicability of MRT 8-A.

We reiterate that it is our firm belief that the Commission should not tie its own hands, especially when there is a consensus that this record should be expanded to address the concerns raised.

/s/ Donald Vial
DONALD VIAL, Commissioner

/s/ William T. Bagley
WILLIAM T. BAGLEY,
Commissioner

June 29, 1983
San Francisco, California

No. 83-1764

In The
Supreme Court of the United States
October Term, 1983

L. D. BUTLER, INC., A CORPORATION,
Appellant,

vs.

PHILIP R. ASHLEY, INDIVIDUALLY AND DOING BUSINESS AS PHIL ASHLEY TRUCKING,
Appellee.

On Appeal from the Court of Appeal of the State of California

MOTION TO DISMISS

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May 23, 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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Appellee.

On Appeal from the Court of Appeal of the State of California

MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein on the ground that it is manifest that the question raised by Appellant is so unsubstantial as not to need further argument. In addition, the question has become moot.

I.

THE PROCEEDINGS BELOW

On June 9, 1982, the Los Angeles County Superior Court entered summary judgment for Appellee and against Appellant on the freight undercharge case which Appellee commenced on August 10, 1979. In pretrial discovery, Appellant had previously admitted: (1) hiring Appellee's intrastate transportation services, (2) that said services were governed by an applicable California Public Utilities Commission Minimum Rate Tariff, and (3) that Appellant had paid a rate less than that prescribed by the tariff. Appellant's only defense was its argument that the applicable tariffs were violative of the Sherman Anti-Trust Act (15 U.S.C. § 1, *et. seq.*).

Appellant appealed to the California Court of Appeal, Second Appellate District, and again raised its Sherman Act argument. In a well-reasoned opinion, which considered all of this Court's opinions on the subject, the Court of Appeals determined that the applicable tariffs were not violative of the Sherman Act and affirmed the trial court's summary judgment. On February 27, 1984, the California Supreme Court denied Appellant's petition for hearing, thereby rendering the Court of Appeal's decision final. This appeal followed.

II.

ARGUMENT

A. The appeal presents no substantial question not previously decided by this Court.

Review of the written decision by the California Court of Appeals[1] clearly demonstrates that the Court carefully considered all of this Court's decisions on the subject and correctly determined that the applicable minimum rate tariffs were not violative of the Sherman Act. Because the Court below decided this issue in full conformance with this Court's prior decisions on the subject, this appeal does not present a substantial federal question which has not already been decided by this Court and should therefore be dismissed. *Palmer Oil Corp. vs. Amerada Petroleum Corp.*, 343 U.S. 390, 391-392 (1952).

B. The question raised in this appeal is moot.

As stated in Appellant's jurisdictional statement, the appeal herein seeks a determination as to whether California Public Utilities Commission Minimum Rate Tariffs 8 and 8A were violative of the Sherman Anti-Trust Act. However, at page 4 of its jurisdictional statement, Appellant further explains that "between the date of the order granting summary judgment and the date of the oral argument before the California Court of Appeal, the California Public Utilities Commission on June 29, 1983, cancelled the tariff . . . ." Thus, Appellant fully acknowledges that the very tariff it complains was in violation of the Sherman Act no longer exists. It has long been recognized that this Court does not sit to decide arguments after events have put them to rest. Accordingly, this appeal should be dismissed as moot. *United States vs. Alaska Steamship Co.*, 253 U.S. 113, 116 (1920); *Doremus vs. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 432-433 (1952).

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[1]Printed in full at pages 1 through 11a of Appellant's jurisdictional statement appendix.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the question raised by this appeal is so unsubstantial as not to need further argument and has also been rendered moot by the cancellation of the applicable tariffs Appellant complains from. Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

KNAPP, GROSSMAN & MARSH

By WESLEY G. BEVERLIN

Attorneys for Appellee,
Philip R. Ashley

No. 83-1764

IN THE

Supreme Court of the United States

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L.D. BUTLER, INC., a corporation,

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vs.

PHILIP R. ASHLEY, individually and doing business as PHIL ASHLEY TRUCKING,

Appellee.

On Appeal from the Court of Appeal of the State of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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No. 83-1764

IN THE

Supreme Court of the United States

October Term, 1983

L.D. BUTLER, INC., a corporation,

Appellant,

vs.

PHILIP R. ASHLEY, individually and doing business as PHIL ASHLEY TRUCKING,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

I.

INTRODUCTION.

It is the contention of Appellant, L. D. BUTLER, INC., that Minimum Rate Tariff 8-A imposed by the California Public Utilities Commission violates the Sherman Anti-Trust Act. (15 U.S.C. § 1 *et seq.*) Appellee, PHILIP R. ASHLEY, contends that the State Action Immunity Doctrine, announced in *Parker v. Brown*, 317 U.S. 341, vitiates any such claimed violation and that the issue is moot.

II.

ARGUMENT.

A. The Question Is Substantial.

Appellee did not present any evidence on the existence of the elements necessary to satisfy the requisites of the State Action Immunity Doctrine. Here, those requisites would be: a. An explicit state policy to restrain com-

petition in the trucking industry, and b. active supervision of such a policy by the State of California. Instead, ASHLEY prevailed by way of a motion for summary judgment. Ashley failed to present any evidence on this point and failed to controvert the statements of BUTLER's president because to do either would have pointed out to the trial judge that there did exist a triable issue of fact, and summary judgment would have been denied. In effect, by admitting the anti-trust violation but claiming that the State Action Immunity Doctrine is applicable, ASHLEY has so far successfully avoided having to prove any supervision of this state policy, supervision that BUTLER claims has not existed for many years.

L. D. BUTLER, INC. never had the opportunity to demonstrate that ASHLEY could not satisfy the requisites of the State Action Immunity Doctrine. BUTLER contends that ASHLEY cannot, as a matter of law, make such a showing. The cancellation of MRT 8-A makes it clear that the State had no affirmative policy of anti-competitive pricing, and that there was no active supervision of the tariff regardless of its purpose.

BUTLER believes that if it had had the opportunity to present evidence regarding the actions of the Public Utilities Commission, the trial court would have found the same discrimination that compelled the Public Utilities Commission to cancel the tariff. BUTLER was denied this opportunity at every level. Appellant submits that Appellee has failed to establish immunity under the Sherman Act because it did not overcome the heavy presumption against immunity; because it failed to show affirmatively expressed and clearly articulated policies with reference to the tariffs in question; and because it failed to show the policy was actively supervised.

B. The Question Raised in This Appeal Is Not Moot.

Appellee misconstrues the gravamen of the appeal. Appellant does not ask this Court to strike down the tariff complained of. This task has already been accomplished. What Appellant does ask this Court to determine is whether the tariff which was applied to Appellant violated the Sherman Act. Neither party would be before this Court if the effect of the elimination of the tariff was to eliminate the judgment rendered as a result of the application of the tariff to Appellant.

Appellee cites *United States v. Alaska Steamship Company*, 253 U.S. 113 for the authority that this Court will not decide arguments after events have put them to rest. In that case, this Court noted: "(w)here by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." Here, the Appellant is still obligated to pay a judgment based on a tariff that it contends violates the Sherman Act. The controversy has not come to an end. The question raised in this appeal is not moot.

III.

CONCLUSION.

For the reasons stated both here and in Appellant's Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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